No. 5664

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

T. TOMICH ET AL.,

Appellants,

vs.

UNION TRUST COMPANY ET AL.,

Appellees.

BRIEF OF APPELLANTS.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

W. N. WAUGH,
JOHN A. SHELTON,
Solicitors for Appellants.

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STATUTES AND CONSTITUTIONAL PROVISIONS.

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For the Ninth Circuit.

T. TOMICH, HARRY F. SCOTT, and H. MULGERGER,

Appellants,

vs.

UNION TRUST COMPANY and SPOKANE & EASTERN TRUST CO.,

Appellees.

and

FEDERAL LAND BANK OF SPOKANE, BIG HORN-TULLOCK IRRIGATION DISTRICT, ASH SHEEP CO., E. J. McCORMICK, County Treasurer of Treasure County, Montana, CHARLES P. DONNES, H. L. HOYLMAN, W. H. UNGLES, JEFFREY DINSDALE, H. M. SHRITE, NICK TOPSICK, D. Y. COOK, PETER BOGUNOVICH, CHARLES BADLANDS, JOHN TOPSICK, FLOYD UNGLES, J. V. McCOY, PASCOE FAURO, JOSEPH PONESA, JESS HINSDALE, TONY FAURO, ROBERT E. CLEARY, and H. F. MARSHALL,

Defendants.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

The respondents, Union Trust Company and Spokane & Eastern Trust Company, are the only defendants who appeared. They filed a motion to dismiss the bill, which motion was sustained and a decree was entered which dismissed the bill as against all defendants. All the allegations of the bill are admitted by the motion to dismiss.

It will only be necessary to consider the case as it affects one only of the appellants, for if the case as made by one of them requires a reversal the decree appealed from must be reversed as to all of them.

It appears from the bill that on June 26, 1919, there was a paper writing designated as a petition for the formation of an irrigation district filed in the office of the Clerk of the Montana Fifteenth Judicial District Court in and for the County of Treasure; that such proceedings were had thereon that there was an attempt to organize a so-called irrigation district to be called and designated as Big Horn-Tullock Irrigation District, this so-called district to embrace 1,599.22 acres situated in Treasure County, Montana, and included 100 acres which belonged to Tomich, who was a complainant; that on the 26th day of June, 1919, there was in existence a system of irrigation by which water was supplied to the lands owned by the said complainant; that his said lands were then under

irrigation; that there were water rights appurtenant thereto, and that the said complainant did not consent to the inclusion of his lands within the said district, never at any time participated in the organization of the said district, but at all times opposed the same and opposed the inclusion of his said lands therein; that upon the so-called organization of the said district proceedings were taken by which there was an unsuccessful attempt to provide a system of irrigation for said district; that for the discharge of expenses connected therewith bonds were issued amounting to $75,000 and in addition thereto warrants were issued amounting to $24,458.03, all of which, if the law was valid, would constitute a lien which with interest amounts to more than $120,000 or more than $75.00 per acre for each acre of land within the district; that for the purpose of payment of the said bonds and warrants and interest thereon taxes have been attempted to be annually levied on the lands in the said district except in the year 1922, and such proceedings have been taken with reference to the said taxes so attempted to be levied that the same appear in the offices of the county clerk and treasurer of said county as tax liens upon all of the said land including that of Tomich; that the said lands were attempted to be sold for the said taxes in 1922 and were bid in by the county of Treasure at such sale, and that steps are threatened to be taken by which a tax deed will be issued to the said county for the said lands; that the said lands on the said 26th day of June, 1919, were of the value

of $75.00 an acre; that the value of the said lands could not possibly be increased in value by the completion and successful operation of the proposed irrigation system in an amount exceeding $25.00 per acre; that since the year 1919 no water has been furnished for the irrigation of the said lands, the said ditches and canals which were then in use have been destroyed by the acts of said irrigation district, and buildings and other improvements on the said lands have fallen into decay; as a consequence of the lack of water for irrigation the said lands have not been cultivated and have grown up in weeds; that if the said bonds and warrants constitute a lien upon the lands of the complainant the same have been rendered valueless by the acts of the said irrigation district; that the proceedings for the attempted organization of the said irrigation district were invalid; that

Section 7167, R. C. M. 1921,

provides that the petition for the organization of such district shall set forth the character of the works, water rights, canals and other property proposed to be acquired or constructed for irrigation purposes in the proposed district, and

Section 7168, R. C. M. 1921,

provides that on the filing of such a petition the Clerk shall cause a copy of the same to be published together with a notice of the time and place on which it will be heard; that the so-called petition filed on the said 26th day of June wholly failed to set forth generally or at all the charac-

ter of the works, water rights or canals proposed to be constructed or acquired for irrigation purposes in the proposed district; that the said petition inferentially stated that such works proposed to be constructed consisted of the extension of a canal at an expense not exceeding $3,000, but as a matter of fact the irrigation work actually proposed to be constructed was besides the extension of the canal, the building of a dam across the Big Horn River at a cost of not less than $72,000; that the only notice given of the said proceedings was the publication of said petition and a notice that the same would be heard on a certain date; that proceedings were had in the said court whereby the so-called organization of the said district was undertaken to be confirmed and validated; that the amount involved in the said proceedings as it affected each of the complainants exceeded the sum or value of $3,000 exclusive of interest and costs; that respondents Union Trust Company and Spokane & Eastern Trust Company are the owners and holders of a portion of the said bonds and a portion also of the said warrants; they knew at all of the times mentioned in the bill that the said petition for the formation of the said district and the notice thereof was defective and insufficient in the particulars stated; that the lands of the complainant Tomich were under irrigation on and prior to the said 26th day of June and had water rights appurtenant thereto; that Tomich did not consent to the inclusion of his lands in the said district;

that the bonds and warrants issued exceeded the benefits which could possibly accrue to the said lands as a result of the said proposed improvements and the taxes for the payment thereof would necessarily be confiscatory of the said lands; that the county treasurer of the said county refused to receive payment of the taxes levied for state and county purposes unless payment was also made of the taxes levied by the said commissioners of the said so-called district; that the complainant Tomich tendered every year payment of the said state and county taxes but such tender was refused by the said county treasurer.

The relief asked is a decree removing the cloud upon the title of complainants to their said lands cast by the said proceedings of said so-called irrigation district, enjoining the execution of a tax deed to the county and declaring the said so-called irrigation district act to be violative of the Constitution of the United States. (Tr. 1 et seq.)

SPECIFICATION OF ERRORS RELIED UPON.

(1) The Court erred in sustaining the motion of the defendants Union Trust Company and Spokane & Eastern Trust Company to dismiss the bill.

(2) The Court erred in deciding that the said Fifteenth Judicial District Court had jurisdiction to include the lands of complainant Tomich within the said district.

(3) The Court erred in deciding that said act is not in conflict with Section 2, Article III and paragraph second of Article VI of the Constitution and sections 24 and 28 of the Judicial Code of the United States.

(4) The Court erred in deciding that the said so-called irrigation district act is not violative of the Fourteenth Article of Amendment to the Federal Constitution in that it permitted the issuance of bonds and warrants in such an amount as to require confiscatory taxation for their payment, but if it did not so permit, that said bonds and warrants are void because their issuance was not authorized by law.

BRIEF OF ARGUMENT.

Before entering upon a discussion of the law points involved in the case another matter requires brief notice. The respondents say that they should not lose the money which they invested in the enterprise since they invested their money in good faith in the bonds and warrants offered to them upon the credit of the district. In answer to this Tomich says a loss by the respondents is, of course, something to be regretted, but as between Tomich and the respondents the equities are in his favor. They acted without any invitation from him with full knowledge of the facts which might affect the value of the securities and should be held to have accepted the risk, while the circumstances which threaten a total destruction of the value of Tomich's property

are due entirely to the acts of others for which he is in no way responsible.

I.

THE SAID MONTANA FIFTEENTH JUDICIAL DISTRICT COURT HAD NO JURISDICTION TO INCLUDE THE LAND OF THE COMPLAINANT TOMICH IN THE SAID SO-CALLED DISTRICT.

Our contention in support of the first point is wholly disconnected from the contention which we make elsewhere with respect to the validity of the said so-called irrigation district act. For the present we assume that the said law is valid. The point which we now make is that assuming that the law is a valid law the court had no jurisdiction to include in the district any land which was then under irrigation. By the record here it is an established fact that the land of Tomich was on the 26th day of June, 1919, under a system of irrigation by which water was applied to the said land and there were water rights appurtenant thereto. Tomich did not consent to the inclusion of his lands in the said district and did not participate in the organization of the said district.

In 1909 the legislature of Montana had undertaken to pass an irrigation district act which was subsequently amended and as amended appears as Sections 7166 to 7264, R. C. M. 1921. It provides in Section 7169, R. C. M. 1921:

"Nor shall any lands which will not, *in the judgment of the Court,* be benefited by irrigation by means of said system of works, nor shall lands already under irrigation, nor lands having water rights appurtenant thereto, nor lands that can be irrigated from sources more feasible than the district system, be included within such proposed district, unless the owner of such lands shall CONSENT IN WRITING TO THE INCLUSION OF SUCH LANDS IN THE PROPOSED DISTRICT * * * provided, however, that where a district is formed to co-operate with the United States, lands previously irrigated and having water rights appurtenant thereto may be included within the district boundaries, *if it shall appear to the court* that the same will be benefited thereby."

The statute provides for two cases in which lands are already under irrigation or have water rights appurtenant thereto. One of them is the case where a district is formed to co-operate with the United States, in which case such land is not to be included in the district *unless it shall appear to the Court that such land would be benefited thereby.* The other case is where a district is formed but not to co-operate with the United States, in which case such lands cannot be included without the owner's consent in writing. In the one case there is plainly a discretionary power vested in the Court and in the other there is not, and in the latter case the Court is given

no jurisdiction or power to include lands which are already under irrigation or have such appurtenant water rights, for, of course, the granting of the discretionary power in one case and withholding it in the other was due, not to accident, but intention.

That construction is to be favored, too, because it is manifest that it was the intention of the lawmakers to protect the interests of the land owners in the case of lands which are already under irrigation.

Added force is also given to our contention by the fact that ordinarily the question whether lands are under irrigation or have water rights appurtenant thereto is not a question about which there may be any substantial controversy.

If the fact is that such lands are not already under irrigation they may be included. If upon the other hand the fact is that such lands are already under irrigation (and that fact is admitted here) the Court has no jurisdiction to include them; if it does so its act is void. The land owner is not called upon to object to such inclusion and the act of the Court in so including them is subject at any time to collateral attack.

Many cases which involve similar questions have been before the courts. The answer which has been given such questions has always depended upon the language of the statute by which the decision of the case was governed. To illustrate: In the case of

Oregon Short Line vs. Pioneer Irrigation District, 102 Pac. 904,

the language of the statute to be construed was as follows:

> "Nor shall any lands which would NOT IN THE JUDGMENT OF SAID BOARD be benefited by irrigation by the said system be included within such district."

Under such a statute it was held that an order by which certain lands were included in such district could not be collaterally attacked for the reason that the question whether or not they would be benefited by irrigation was a matter within the jurisdiction of the board which passed upon the matter.

The following cases involve the identical question that is involved in this case:

Andrews vs. Lilian Irrigation District, 97 N. W. 336.

State vs. Several Parcels of Land, 114 N. W. 283.

Horn vs. Shaffer, 151 Pac. 555.

City vs. Fresno Irrigation District, 237 Pac. 772.

It was urged in each one of those cases as it is here that the court or board which passed upon the matter had jurisdiction to include certain lands within an irrigation district and upon the other side it was contended that the court or board which passed upon the matter did not have such jurisdiction, and in each of said cases contention

was made for and against the proposition that the land owner in order to protect his rights was required to appear before the court or board which passed upon the matter and to have made objection there to such inclusion of his lands. In most of those cases the statute to be construed was substantially the same as the one which we are now considering. The decision of the Court in each case was that such court or board did not have jurisdiction to include the lands in question in an irrigation district and in consequence that the order so including such lands was void and might be attacked collaterally.

In the case of Andrews vs. Lilian Irrigation District, *supra,* the statute of Nebraska under consideration contains two provisions, which were both considered. One of the said provisions is to effect that no land shall be included in an irrigation district that will not in the OPINION OF THE BOARD be benefited by irrigation. The said statute contains another provision which is to the effect that in no case shall land which from some natural cause cannot be irrigated be included in such irrigation district or taxed for irrigation purposes. Andrews brought his suit against the irrigation district for the purpose of having declared the previous levy of taxes by the irrigation district upon his lands to be a cloud and to cancel them and that his lands be declared to be no part of the said district.

The lower court sustained a demurrer to the petition and the Supreme Court on Appeal first

affirmed the decision of the lower court upon the ground that its allegations brought the case within the first of said provisions and that the determination of that question was within the jurisdiction of the Board of County Commissioners. Upon a petition for a rehearing being filed that decision was reconsidered and it was held that the petition brought the case within the second of said provisions and that in such a case the board did not have any jurisdiction to include such lands. From the opinion of the Court on rehearing we quote the following:

> "Section 49 of said chapter provides that in no case shall land which from some natural cause cannot be irrigated be held in any irrigation district, or taxed for irrigation purposes. Thus it will be seen that the act under consideration clearly distinguishes between land which would not be benefited by irrigation, and such as from some natural cause is nonirrigable. As already shown whether a particular tract of land will be benefited by a proposed system of irrigation is a question which the legislature has confided to the county board. Whether a particular tract of land from some natural cause cannot be irrigated is a question which goes to the jurisdiction of the county board over such tract, and may be raised at any time in a proper case, because section 49, *supra,* expressly denies the jurisdiction of the county board to include such land in an irrigation

> district, or to tax it for irrigation purposes. Should such land be included within the boundaries of an irrigation district, or taxed for irrigation purposes, it would be in violation of a plain provision of the statute."

In the case of State vs. Several Parcels of Land, *supra,* a statute was under consideration which contains the following:

> "That where ditches or canals have been constructed before the passage of this act of sufficient capacity to water the land thereunder for which the water taken in such ditches is appropriated, such ditches and franchises and the land subject to be watered thereby shall be exempt from the operation of this law."

The suit was one brought by the state to enforce the payment of taxes levied by an irrigation district upon certain pieces of land which had been included within such irrigation district. The defense to the suit was that such lands could not be included in the irrigation district, for the Board of County Commissioners had no jurisdiction to include such land for the reason that ditches had been constructed sufficient to water such land, water for that purpose had been appropriated and in consequence thereof the board had no jurisdiction to include such lands in the district and that its order in attempting to do so was void. The Court adopted that contention and held that the order including such lands within the district was in ex-

cess of the jurisdiction of the Board of County Commissioners and was therefore void, the Court saying:

> "It is, however, contended that the county board had jurisdiction, and that its determination cannot be attacked in this proceeding. It must be conceded that, as to those matters which were by the statute committed to the consideration, investigation and determination of the county board, its judgment should not be collaterally attacked; but the question here is: Was it left to the county board to decide whether this land was under a ditch constructed prior to that time and of sufficient capacity to water the same * * * As already shown whether a particular tract of land will be benefited by a proposed system of irrigation is a question which the legislature has confided to the county board. Whether a particular tract of land, from some natural cause, cannot be irrigated, is a question which goes to the jurisdiction of the county board over such tract, and may be raised at any time in a proper case, because section 49, *supra,* expressly denies the jurisdiction of the county board to include such land in an irrigation district or to tax it for irrigation purposes."

The case of Horn vs. Shaffer, *supra,* was a suit brought against the county treasurer of Uinta County, Utah, to enjoin him from collecting a special tax assessed by the New Hope Irrigation District. The Utah statute under consideration con-

tained a clause similar to the Nebraska statute which was considered in the case last above referred to and is as follows:

> "Provided, that where ditches, canals, or reservoirs have been constructed before the passage of this act, such ditches, canals, reservoirs, and franchises, and the lands watered thereby, shall be exempt from the operation of this law, except such district shall be formed to purchase, acquire, lease or rent such ditches, canals, reservoirs and their franchises."

The plaintiff in his complaint in the action alleged:

> "That the pretended assessment against the plaintiff and his said lands of the said purported tax item given as 'N. Hope,' as above described, was not and could not be legally made for the reason that at the time of the pretended organization of said New Hope Irrigation District, and for many years immediately prior thereto, to wit, ever since the year 1906, the plaintiff as co-owner with others, had constructed a ditch, and had conveyed through said ditch water to his said lands as hereinbefore described, and had used said water on the said lands for irrigation and other beneficial purposes."

The allegations of the complainant also were to the effect that the tax in question was illegal because the officers of the district had no power or authority to levy taxes on the plaintiff's land.

In the trial court upon the trial the plaintiff offered proof of the allegations of his complaint which proof was rejected and the court sustained a motion for a nonsuit. The Supreme Court in reversing the decision of the lower court said:

> "A mere cursory examination of those parts of the pleadings we have set forth also shows that both the plaintiff and the defendant regarded the question of whether plaintiff's land was exempt under the proviso a question of fact. The plaintiff alleged that it was exempt because of the facts stated, and the defendant denied the allegations in that regard. There can be no doubt that the question is at least one of mixed law and fact, and hence the Court should have found the facts and made conclusion of law thereon, and should have entered judgment accordingly. Instead of that the Court determined the whole matter upon a motion for a nonsuit. This constituted reversable error."

In the case of City vs. Fresno Irrigation District, *supra,* the so-called Wright Law, which it is said is the model which was followed in framing the Montana Irrigation District statute, was under consideration. The city of Fresno sued the Fresno Irrigation District to enjoin the collection by the collector of the said irrigation district of certain taxes levied by the district on lands owned by the city upon the ground that the land in question was devoted to a public use and therefore was not subject to taxation by the irrigation district. A de-

murrer to the complaint was overruled and judgment rendered in the case for the plaintiff from which the defendant appealed to the Court of Appeals, which held that in California lands which were actually devoted to a public use were exempted from taxation of the character in question. It was contended, however, that whether the land in question was actually devoted to a public use was question of fact, that the city had an opportunity to present the question of the propriety of including its land in the irrigation district, that it failed to avail itself of that privilege and that the question was, therefore, one which could not be afterward raised, since the irrigation district had jurisdiction to determine the question of fact as to whether the land in question was actually devoted to a public use. In passing upon this contention the Court said:

> "The appellants urge that there is no showing in the complaint that the city attempted to have its lands excluded from the district or that, after the assessment was levied, it appeared before the board of directors of the district sitting as a board of equalization or objected to the assessment. The property being exempt from assessment, it was not necessary that the city, in order to avoid assessment, should have taken either of these steps."

The lands of Tomich being admitted to have been on June 26, 1919, already under irrigation and to have water rights appurtenant thereto, the irrigation district had no power or authority to include

such lands in the district and its act in so doing was a void act and might be at any time collaterally attacked.

II.

THE MONTANA IRRIGATION DISTRICT ACT IS VIOLATIVE OF ARTICLE III, SECTION 2, AND ARTICLE VI, PARAGRAPH SECOND OF THE FEDERAL CONSTITUTION, AND IS IN CONFLICT WITH SECTIONS 24 AND 28 OF THE JUDICIAL CODE.

The point which we are now making assumes that if the law were a valid law that the irrigation district had jurisdiction to determine the question whether the land of Tomich should be included in the district. If our first point should be determined favorably to our contention it will be unnecessary to consider our second and third points, for if the first point is determined in our favor it will be necessary to decide that the decree of the lower court should be reversed.

As we have already seen there was an attempted proceeding by the Montana Fifteenth Judicial District Court for the purpose of confirming and validating the proceedings by which the said so-called district were attempted to be organized and under which there had been an attempt to issue bonds of the district amounting to $75,000. The provisions of the statute

Section 7211, R. C. M. 1921,

are that the Board of Commissioners of the irrigation district MUST within ten days after the adop-

tion of a resolution for the issuance of bonds file in the STATE District Court of the Judicial District wherein is located the offices of said board a petition to determine the validity of the proceedings relating to the formation of such district and the issuance of such bonds, and an appeal may be taken to the Montana Supreme Court, and if such appeal shall not be taken or if taken and the judgment of the District Court is affirmed the said judgment of the District Court SHALL BE A FINAL JUDGMENT AND THE SAME SHALL NEVER BE CALLED IN QUESTION IN ANY COURT.

The question of the validity of the bonds, as has already been shown, involved the question whether the proceedings which resulted in the attempted organization of the district and the issuance of the bonds was due process of law. It appears that they were not due process of law for the reason that notice required by the statute was not given.

Pennoyer vs. Neff, 95 U. S. 773; 24 L. Ed. 565.

Scott vs. McNeal, 154 U. S. 46; 38 L. Ed. 896.

The value of the interests involved which were held by Tomich exceeded the sum of $3,000, exclusive of interest and costs and the question of the validity of the organization of the district and therefore the question of the validity of the proceedings by which the bonds were undertaken to be issued was a question of which under the Constitution and Laws of the United States the United States District Courts are given jurisdiction. The Montana statute prohibits a suit by Tomich in the

United States courts for the purpose of determining the validity of the bonds, for the provisions of the statute require that such suit be brought by the commissioners and in the state court, and the determination of the state court if there is no appeal or if there is an appeal but the determination by the Supreme Court is an affirmance, the judgment is given a conclusive and binding effect and there is a prohibition against afterward raising the question in any other court.

An independent suit by Tomich in the United States court to enjoin the issuance of the bonds would have been a futile proceeding. By the terms of the statute the petition by the commissioners must be filed, and as there was no notice of the character of the works proposed to be constructed it was not possible that Tomich should be able to anticipate the steps which might be taken by the district commissioners so as to enable him to start a suit in the federal court before such petition (which ordinarily is filed immediately upon the passage of the resolution for the issuance of the bonds) is filed in the state court, and the jurisdiction of the state court having first attached, the state court would not have stayed such proceeding nor would it have stayed such proceedings if a suit by Tomich in the United States court had been first filed; for under the state statute the filing of the petition and the prosecution of the proceeding is made not a privilege but a duty, and the duty may not be excused by the pending of some other suit.

The proceedings brought in the state court could not be removed into the federal court because (except certain exceptional cases within which this case cannot be included) cases which may be removed into the federal court are only such as may be brought there.

If the Montana irrigation district act is a valid law the federal statute defines the jurisdiction of the United States District Courts, and which provides for the right of removal of cases from the state courts to the said United States District Courts, cannot be given effect. The two laws are contradictory of each other and consequently the state law is invalid because the federal statute was enacted in pursuance of the provisions of the federal Constitution.

At least the said section 7211 must be held to be invalid, and if the so-called confirmation proceedings are invalid, there is no bar to a consideration of the question of the validity of the said bonds and the said proceedings.

III.

THE MONTANA IRRIGATION DISTRICT ACT IS VIOLATIVE OF THE DUE PROCESS OF LAW CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION IN THAT IT PERMITS THE ISSUANCE OF BONDS AND WARRANTS WHICH WILL REQUIRE FOR THEIR DISCHARGE THE LEVY OF TAXES BY THE IRRIGATION DISTRICT IN EXCESS OF BENEFITS WHICH MAY POS-

SIBLY BE DERIVED FROM MONEY REALIZED FROM SUCH BONDS AND WARRANTS, BUT IF THE STATUTE DOES NOT PERMIT SUCH ISSUANCE OF BONDS AND WARRANTS THEY WERE NEVERTHELESS SO ISSUED IN THIS CASE, AND ARE INVALID, BECAUSE IF NOT PERMITTED BY THE STATUTE THEY WERE NOT AUTHORIZED BY LAW.

It is admitted that the land of Tomich was under irrigation at the date of the petition for the so-called irrigation district; that such land was then of the reasonable value of $75.00 an acre; that the value of such land could not be possibly increased beyond $25.00 an acre by the successful completion and operation of the proposed irrigation works; that the indebtedness of the said district contracted in an attempt to provide such works and which is represented by said bonds and warrants exceeds $120,000 or more than $75 an acre for every acre of land within the district and which if the law is valid is a lien upon such land to the amount of such indebtedness; that the attempt of the district to construct or maintain irrigation works has been wholly unsuccessful; that there has been no water furnished for the lands in the irrigation district since the year 1919; that in consequence the land since 1919 has grown up in weeds; that buildings, fences and all other improvements have fallen into decay and that the indebtedness contracted by the

said so-called district is such that if valid the value of the Tomich land has been totally destroyed.

It is a well-settled rule of law that taxes for special improvements cannot be levied in excess of the improvements which are thereby created or which may possibly be thereby created. If it is possible to increase the value of land by a special improvement to the extent of $25.00 an acre, taxes amounting to $75.00 an acre cannot be levied for that purpose, because if they were then the property of the land owners to the extent of $50.00 an acre would have been taken without due process of law.

The indebtedness of $120,000 for the district means, of course, that the total of taxes required to be levied must equal that amount in order that the indebtedness may be discharged and the bonds and warrants must be held invalid if confiscatory taxation is necessary to pay them, unless, of course, they are in the hands of innocent purchasers, for value and without notice. In this case the prohibition against such unlawful taxation reaches the owners of the bonds and warrants because it is admitted that they knew that the improvements proposed exceeded in cost the possible benefit which could accrue at least to the extent of $50.00 an acre.

The question which is here presented was suggested in the case of

Andrews vs. Lilian Irrigation District, 92 N. W. 612,

referred to above. That case like the present case was a suit to declare taxes levied by an irrigation district upon the lands of the plaintiff a cloud upon

his title. In that case the complaint alleged that the lands of the appellant could not be benefited by irrigation but that the said lands were lands which would be injured by the distribution of water upon them by the irrigation system of ditches. In the original decision it was held that the remedy of the plaintiff was an application to the defendant to have these lands excluded. The Court went on to consider the question which would be presented if such an application should be denied and in passing on this point the Court used the following language:

> "If the effort should be made and should fail, some highly interesting questions would arise as to the constitutional right or legislative power of taxing private property for the construction and maintenance of public improvements by which it is not only not benefited, but is demonstrably injured."

The point here involved was passed upon in the case of

Dusch vs. Bronson, 248 Fed. 377,

a decision by the Circuit Court of Appeals for the Eighth Circuit, and a suit brought by a receiver of a railroad company to enjoin a sheriff from selling the railroad property for the purpose of collecting taxes levied for the construction of a highway. It was held that the power of taxation arbitrarily exercised for special improvements without compensation equal to the amount of taxes therefor amounts to confiscation and violates the due process

of law provision of the Fourteenth Amendment to the Constitution.

In

Lyon vs. Tonowanda, 98 Fed. 364,

it was held that the case of

Norwood vs. Baker, 172 U. S. 270, 43 L. Ed. 44,

declared the following principle, to wit:

> "The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation."

The rule of law here stated was declared in the following:

Myles Salt Co. vs. Board of Commissioners, 239 U. S. 478, 60 L. Ed. 392.
Cowley vs. Spokane, 99 Fed. 844.
Jefferson vs. Wells, 172 S. W. 329.
Foy vs. Springfield, 94 Fed. 409.
Scranton vs. Levers, 49 Atl. 980.
Scott vs. Toledo, 36 Fed. 396.
Raisch vs. Regents of University of California, 174 Pac. 942.
Excelsior Plating Co. vs. Green, 1 So. 873.

As the taxes necessary to discharge the said bonds and warrants will in fact amount to confiscation there is no power in the officers named as defendants to collect them.

The only justification for the acts of the officers of the irrigation district in issuing the said bonds and warrants and levying taxes for their satisfaction is that their said acts were within the powers conferred by the said irrigation district statute. If the statute is valid it undoubtedly confers such power, but as the bonds and warrants are so large in amount as to require confiscatory taxation for their discharge, the statute must be held to be invalid upon the ground that it permits a violation of the constitutional provision. If it should be held, however, that the said acts were not permitted by the said statute, then such unauthorized acts are void and the said bonds and warrants are without validity for that reason.

The appellants respectfully submit that the decree appealed from should be reversed.

Respectfully submitted,

W. N. WAUGH,

JOHN A. SHELTON,

Solicitors for Appellant.